Laborers' International Union of North America, Local 872 *and* NAV-LVH, LLC d/b/a Westgate Las Vegas Resort & Casino. Case 28–CC–148007

April 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On August 21, 2015, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief that both supported its cross-exceptions and answered the Charging Party's exceptions. The Charging Party filed an answering brief to the Respondent's cross-exceptions, and the Respondent filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order dismissing the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Elise F. Oviedo, Esq., for the General Counsel.
David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld), for the Respondent Union.
Myrna L. Maysonet, Esq. (Greenspoon Marder, P.A.), for the Charging Party Company.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In early 2015, the Westgate Las Vegas Resort & Casino contracted with Nigro Construction, LLC to perform renovation work at the facility. Nigro, in turn, subcontracted with A&B Environmental, LLC, to do the abatement. Shortly thereafter, Laborers

[1] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(b)(4)(i)(B) of the Act by inducing or encouraging the employees of the Charging Party or any other secondary employer to stop working. Nor are there exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(b)(4)(ii)(B) by displaying banners on public property. The General Counsel did not file exceptions or any briefs in this matter.

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In dismissing the complaint, we agree with the judge that the appropriate legal standard for evaluating whether nonpicketing conduct is "coercive" and therefore in violation of Sec. 8(b)(4)(ii)(B) of the Act is whether the conduct "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 805 (2010) (display of banners at secondary employer's business did not violate Sec. 8(b)(4)(ii)(B)); *Sheet Metal Workers Local 15 (Brandon Medical Center)*, 356 NLRB 1290, 1292 (2011) (display of inflatable rat at secondary employer's worksite did not violate Sec. 8(b)(4)(ii)(B)). We further agree, for the reasons stated in the judge's decision, that none of the Respondent's conduct in setting up and displaying the inflatables at issue was unlawful under this standard. Contrary to the Charging Party's assertions, the Respondent's placement of inflatables on utility cutouts on the Charging Party's property did not constitute per se coercive conduct, particularly given that the Respondent stopped placing the inflatables on the cutouts immediately after the Charging Party marked them as private property. See *Carpenters Southwest Regional Council (Richie's Installations)*, 355 NLRB 1445, 1445, 1449 (2010) (no coercion found where a banner was relocated in response to notification from a secondary employer and police that the union banner holders were trespassing by standing on the secondary's property). In finding that the Respondent's conduct was not coercive, we agree with the judge that it is unnecessary to rely on the testimony of Respondent Director of Organizing Mike DaSilva that on March 6, 2015, the first day of the Respondent's protest, a water district employee told him there was no problem placing an inflatable on a nearby utility cutout because the utility workers were not working there, and that a metro police detective told him "you guys are good" after viewing the locations of the various banners and inflatables set up that morning. The judge properly found that "the Union's conduct did not violate the Act even without the testimony."

Finally, we agree with the judge that because the Respondent did not engage in picketing or disruptive or otherwise coercive nonpicketing conduct in violation of Sec. 8(b)(4), we need not reach the question of whether the Respondent's conduct had an unlawful secondary object. See *Eliason*, above at 800 fn. 12. Furthermore, because we are dismissing the complaint, we need not reach the Respondent's alternate defenses predicated on the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb—2000bb-4.

Local 872, which was not the bargaining representative of any of the three companies' employees, began protesting at the Westgate by stationing large banners and inflatables at various locations around the perimeter of the property. The banners were about 4 feet high and 20 feet long, and stated "LABOR DISPUTE: NIGRO DEVELOPMENT SUPPORTS IMMIGRANT LABOR ABUSE BY HIRING A&B ENVIRONMENTAL AT THE WESTGATE." Each banner was framed with white PVC pipe and held upright by one or two individuals standing behind or beside it. The inflatables were typically placed near the banners and included a rat, cockroach, and anthropomorphized pig and cat, all standing erect on their hind legs, about 18–20 feet tall.

The complaint alleges that, by the foregoing conduct, Local 872 engaged in unlawful secondary "picketing" against Westgate in support of the Union's dispute with Nigro and A&B. The General Counsel concedes that the Union had a right under Board precedent to station large banners and inflatables at the Westgate. However, the General Counsel contends that the Union's conduct went too far, violating the secondary boycott provisions in Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, because some of the inflatables, banners, and banner holders blocked pedestrian sidewalk access ramps and vehicular ingress and egress at the Westgate facility and/or trespassed onto Westgate's property, thereby creating confrontation with both the public and Westgate employees.[1]

The Union denies that it blocked ingress and egress or trespassed. Further, it contends that, even if it did, the blocking or trespass was relatively brief or very minor and noncoercive. Finally, it contends that Section 8(b)(4)(ii)(B) of the Act, on its face and/or as applied, violates the First Amendment and the Religious Freedom Restoration Act (RFRA).

A hearing on the matter was held on June 23 in Las Vegas.[2] Thereafter, on August 14, the General Counsel, Westgate, and Local 872 filed briefs. Having carefully considered those briefs and the entire record, for the reasons set forth below I find that the evidence fails to support the alleged violations under extant law.[3]

FINDINGS OF FACT

The Westgate is located a block east of the north end of the Vegas strip. It is bordered on the west by Paradise Road, on the north by Karen Avenue, and on the east by Joe W. Brown Drive. It includes a 3000-room hotel, a full casino, multiple restaurants, and 250,000 square feet of convention space, surrounded by 36 acres of land. It employs approximately 1800–2200 employees. Most of the employees are represented by one of seven different unions. As indicated above, however, none are represented by Local 872.

Local 872 began protesting at the Westgate on Friday, March 6. It resumed on Monday, March 9, and continued every day thereafter, excluding weekends, until March 24.[4] The protest typically started around 6:30 a.m. each day, when the Union arrived at the Westgate property and began setting up the inflatables and banners, and concluded in the afternoon. Up to seven inflatables and approximately the same number of banners were stationed around the perimeter of the property. Of these, two of the banners and five of the inflatables are at issue here.

A. The Banners

1. Banner on traffic island near front entrance

The front/main entrance to the Westgate facility is on the west side of the property facing Paradise Road. It is accessed by a circular driveway and adjacent walkway beginning where Paradise Road is intersected from the west by Riviera Boulevard.

The front entrance walkway is used by both patrons and employees of the Westgate. If they approach from the west using the sidewalk on the north side of Riviera Boulevard, they have two options to get there. One option is to turn right when they reach the corner of Riviera and Paradise and use the crosswalk to get to the south side of Riviera Boulevard (a distance of about 80 feet). They would then turn left and use the south-side crosswalk to cross Paradise Road and proceed directly onto the walkway.

A second option is to continue straight at the corner of Riviera and Paradise and use the north-side crosswalk that crosses Paradise Road. That crosswalk leads to a triangular traffic island (►) that bisects the driveway exit lanes that head NW

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[1] See GC Exhs. 1(e) (the Mar. 31 complaint) and 2 (the June 23 amendments thereto); and Tr. 36–42. In relevant part, Sec. 8(b)(4)(i)(ii)(B) of the Act states:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

[2] The Board's jurisdiction is uncontested and established by the admitted facts (Tr. 28–29).

[3] Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[4] It is not clear from the record why the protest ended. No petition for interim injunctive relief was filed under Sec. 10(l) of the Act (Tr. 40).

and SW out of the Westgate property. After walking onto the traffic island, they would turn right and walk off the island on the south side and cross both the SW exit lanes and the entrance lanes (likewise a distance of about 80 feet). They would then turn left and proceed onto the front entrance walkway.

The traffic island is public property and Westgate has no control over it. It is rather large, approximately 35-feet long on each side, and also serves as the base for a traffic light pole that extends over Paradise Road. Like the public sidewalks, the island has sloped ramps to permit access by an individual using a wheelchair or mobility scooter. The ramp on the west side of the island faces the pedestrian crosswalk on Paradise Road and is approximately 5-feet wide. The ramp on the north side of the island leads to a crosswalk that cuts across the NW exit lane and onto the public sidewalk that runs north along the western boundary of the Westgate property.

The ramp on the south side leads to the crosswalk that cuts across both the SW exit lanes and the entrance lanes and onto the walkway that leads to the Westgate front entrance (as well as onto the public sidewalk that continues south along the border of the property). [5]

The subject banner was placed on the western edge of the traffic island facing Paradise Road and Riviera Boulevard. It was stationed there, with a banner holder standing behind it on each end, on the very first day, March 6, and thereafter through March 16. Due to its length, it extended from the northern tip of the traffic island down to about one-half to three-quarters (depending on its exact placement) into the west-side access ramp (which is just south of the center of the island). See the photographs taken on March 6 and 12 (GC Exhs. 3(h), 6(d), and 7(b)). Thus, an individual in a wheelchair or mobility scooter crossing over from the north side of Riviera Boulevard would likely have encountered difficulty using the west-side access ramp onto the traffic island with the banner there.

However, there is no evidence that the two banner holders refused to shift or angle the banner to allow an approaching wheelchair or mobility scooter to use the ramp. In fact, no individual in a wheelchair or mobility scooter ever used the north-side crosswalk to the traffic island while the banner was there. Nor is there any evidence that anyone used the alternative, south-side crosswalk because the union banner was on the traffic island.[6]

2. Banner on sidewalk near southwest corner

Beginning on March 6, the Union also stationed one of the banners on the public sidewalk about 800 feet south of the Westgate front entrance, near the southwest corner of the property. It was placed just north of a driveway that employees use to access a parking lot next to the Westgate Event Center. As discussed below, the Union also placed an inflatable rat in the driveway itself on March 6.

However, like the banner on the traffic island, the banner was placed near the outer/western edge of the sidewalk, facing the traffic on Paradise Road. Thus, pedestrians could pass behind it. See GC Exh. 3(j).[7] See also GC Exh. 6(b), (c) (photographs showing the same banner on March 12). Further, unlike the banner on the traffic island, there is no credible evidence that it blocked the ramp on the curved end of the sidewalk leading south across the employee driveway.[8]

B. The Inflatables

1. Inflatable rat in Event Center employee driveway

The Westgate Event Center can be accessed by using the same circular driveway and walkway that leads to the front entrance of the hotel and casino. However, as indicated above, there is also another driveway entrance further south down Paradise Road at the rear of the event center. The entrance is primarily for Westgate's banquet personnel, who park in a lot next to the building. It is therefore gated to prevent the public from parking there. The gate is about 50 feet into the two-lane driveway. The gate is usually closed and locked with a chain and padlock, unless Westgate unlocks it in the morning. Even when the gate is unlocked, however, it is kept closed. When employees enter, they must get out of their car to manually open and close the gate.

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[5] Unfortunately, the exhibits and testimony do not provide a full or satisfactory view or description of the subject location (3000 Paradise Road). I have therefore consulted and taken judicial notice under FRE 201 of the Google map and satellite images of the site. See generally *Bud Antle, Inc.*, 359 NLRB No. 140, slip op. at 1 fn. 3 (2013), reaffd. 361 NLRB No. 87 (2014); *U.S. v. Perea-Rey*, 680 F.3d 1179 fn. 1 (9th Cir. 2012); *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1177 fn. 3 (7th Cir. 2013); and *Pahls v. Thomas*, 718 F.3d 1210 fn. 1 (10th Cir. 2013).

[6] According to Phillip Froehlich, vice president of the Western Region for Westgate Resorts, on March 9 and 10 the foregoing banner was instead stationed just north of the traffic island, across the NW exit lane, on the public sidewalk. And, as on the traffic island, it was placed in such a way that it extended partially onto the ramp at the curved end of the sidewalk leading south toward the island. (Tr. 68–80.) However, I discredit this testimony. First, unlike with the other locations at issue, it is not corroborated by any photographic evidence. Second, it is inconsistent with the testimony of both Gregory Laughman, executive director of security at the Westgate, and Mike DaSilva, Local 872 director of organizing. Laughman testified that the banner was still on the traffic island on March 9 and 10; that the banner did not move to the north sidewalk until March 16; and that he did not notice any obstruction of pedestrian ingress or egress as of that date (Tr. 199–200). DaSilva likewise testified that he did not move the banner off the island until March 16 (Tr. 288). See also GC Exh. 6(d) (a photograph showing the banner on the traffic island on Mar. 12), and Tr. 122, 127 (the testimony of Oscar Villarreal, Jr., one of the two banner holders). In any event, even if the banner was partially blocking the sidewalk ramp on March 9 and 10 or some later date, as on the traffic island there is no evidence that the banner holders refused to shift or angle the banner to allow an approaching wheelchair or mobility scooter to use the ramp. Nor is there any evidence that anyone was unable to get by to cross the NW exit lane, access the traffic island, and continue south across the SW exit and entrance lanes to the front entrance walkway.

[7] Again, in making the foregoing findings, I have consulted the Google map and satellite images of the location (3060 Paradise Road), including but not limited to those entered into the record (GC Exh. 12(a)–(d)). The satellite images indicate that the sidewalk is about 6 feet wide, adequate to accommodate the banner, banner holders, and pedestrians.

[8] Although Security Director Laughman testified that the banner blocked the sidewalk ramp (Tr. 193), I discredit that testimony as it is not consistent with the photographic evidence or corroborated by any other witness.

The subject inflatable rat was placed on the driveway at the NW outer edge where it flares out for cars to make a gradual right turn to exit and proceed north on Paradise Road. The rat was set back from the road about 8 feet, behind a white stripe that runs across the driveway from the public sidewalk (apparently to designate where exiting cars should stop to allow pedestrians to cross the driveway from the sidewalk). Thus, it did not block the pedestrian crossing. However, it was on Westgate property and partially blocked the driveway exit. Nevertheless, it was placed far enough over that it would not have prevented a car from exiting straight out with a hard right turn. See GC Exhs. 3(i), 11(d)–(f), and 12(a)–(d).[9] And it was stationed there only on the first day, March 6, when the gate was locked and there was no traffic going in or out.[10]

2. Inflatables on utility cutouts

The rest of the subject inflatables were stationed on so-called "utility cutouts" around the perimeter of the Westgate property. The utility cutouts are areas abutting the public sidewalk where local utility companies are provided an easement to service or repair the utilities for the property as needed. The sizes of the cutouts vary, but they are generally no larger than necessary for the utility companies to easily and safely access the utility boxes or lines. However, they are large enough to station inflatables on them and avoid blocking the public sidewalk itself.

On March 6, and again on March 9, 10, and 11, the Union placed a total of four inflatables on the cutouts: a rat and a cockroach on two cutouts on the north side (Karen Avenue); and a pig and a cat on two cutouts on the west side (Paradise Road). See GC Exhs. 3(c), (e), (f), (g), and 11(a)–(c), (g)–(o). At the time the Union did so, there were no obstructions or signs indicating that the cutouts were private property and off limits to anyone other than the utility companies. Nor did any of the utility companies ask the Union to remove the inflatables from the cutouts.[11] On March 12, however, Westgate put a chain around each of the cutouts with a sign saying "private property." See GC Exh. 6(e)–(h), (j), (l). The Union, therefore, did not put any of the inflatables on the cutouts that day or thereafter.

Analysis

The Board in numerous cases has held that the display of stationary union banners at a secondary/neutral employer's premises notifying the public of a labor dispute does not constitute picketing or disruptive or otherwise coercive nonpicketing conduct violative of Section 8(b)(4)(ii)(B) of the Act. See, e.g., *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.),* 355 NLRB 797 (2010) (finding that union did not violate Section 8(b)(4)(ii)(B) by stationing similar large banners with up to four holders within 15 feet from entrances); and *Carpenters Local 1506 (Marriott Warner Center),* 355 NLRB 1330 (2010) (following *Eliason* and likewise finding no 8(b)(4)(ii)(B) violation, notwithstanding that union stationed the banners with two or three holders less than 15 feet from entrances). The Board has reached the same conclusion with respect to stationary union inflatables. See *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011) (finding that union did not violate Section 8(b)(4)(ii)(B) by stationing a similar large inflatable rat within 100 feet from entrances).

The General Counsel argues that the foregoing decisions are distinguishable because the displays in those cases did not block ingress and egress or create confrontation with individuals seeking to enter or exit the premises. However, as discussed above, none of the banners or inflatables here actually blocked or significantly impaired ingress or egress or created confrontation. Although one banner partially blocked a wheelchair or mobility scooter access ramp, it was on a public traffic island 80 feet away from the front entrance walkway, and an alternative route of equal distance was readily available. Further, there is no evidence that anyone was actually blocked, impaired, or delayed in accessing the front entrance walkway because of the placement of the banner. As for the rat in the event center employee driveway, it was placed in the far NW corner where the exit lane flared out, and would not have prevented a car from exiting. Further, the entrance gate was locked that day, and therefore no employees actually used, or were expected to use, the driveway to enter or exit. Thus, whatever blockage occurred at either location was insignificant and de minimis. See *Eliason*, 355 NLRB at 807 fn. 30 (blocking ingress or egress is not coercive if it is "not significant, i.e. it is de minimis"). Compare also *SW Regional Council of Carpenters (Richie's Installations, Inc.),* 355 NLRB 1445 (2010) (finding no 8(b)(4)(ii)(B) violation, notwithstanding that the union occasionally moved the banners, as the movement was

[9] As above, in making the foregoing findings, I have consulted the Google map and satellite images of the location, including but not limited to those in the record (GC Exh. 12(a)–(d)). The satellite images indicate that the flared out portion of the driveway is about 6 feet wide where the rat was placed, wide enough to accommodate the body of the rat. Although the rat also had a tail, the photograph of the rat (GC Exh. 3(i)) shows that its tail was curled toward the sidewalk and therefore mostly off the driveway.

The photographs also show the Union's white van parked in front of the rat and partially blocking the pedestrian crossing. However, the General Counsel does not allege that this constituted an 8(b)(4) violation. See Tr. 61–67 and the General Counsel's posthearing brief.

[10] I credit Local 872 Organizing Director DaSilva's testimony that the rat was stationed in that location only on March 6 (Tr. 274–275). Although Security Director Laughman testified, in response to a leading question by counsel for the General Counsel, that he saw the rat in the employee driveway entrance on March 9 (Tr. 192), his testimony is not corroborated by photographic evidence or any other witness. See also Westgate's posthearing brief at 3 fn. 2 (acknowledging that the rat was moved to another location on March 9). In any event, Laughman admitted that he did not see anyone enter or exit the driveway during the period the rat was stationed there (Tr. 218).

[11] Local 872 Organizing Director DaSilva testified that he spoke to a water district employee who happened to be working near one of the west-side utility cutouts on March 6, and the employee said there was no problem putting an inflatable in the cutout as they were not working there (Tr. 260–261, 264, 278–284, 304). DaSilva also testified that a metro police detective told him "you guys are good" after the detective and two uniformed officers walked around and looked at all the banners and inflatables that morning (Tr. 281–284, 295). Although DaSilva's testimony is uncorroborated, it is also uncontroverted, and there is no other compelling reason on the record to discredit it. However, I would find that the Union's conduct did not violate the Act even without the testimony.

"de minimis").

The General Counsel also argues that the Board's prior decisions are distinguishable because the rat in the event center driveway and the other inflatables on the utility cutouts were on Westgate's property. However, the relevant inquiry in evaluating whether nonpicketing conduct violates Section 8(b)(4)(ii)(B) is whether it "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." *Eliason*, 355 NLRB at 807; *Brandon Regional Hospital*, above at 1292. Here, as discussed above, neither the event center driveway nor the utility cutouts were being used by Westgate or utility company personnel at the time. Thus, none of the inflatables at those locations directly disrupted, or threatened to directly disrupt, Westgate's operations. Moreover, the rat was stationed at the event center only one day, and the Union ceased placing the inflatables on the cutouts when Westgate clearly marked the cutouts as private property on March 12.[12] Thus, the Union's conduct cannot reasonably be characterized as unlawful harassment or repeated trespass. See *520 S. Michigan Avenue Assoc., Ltd. v. UNITE HERE Local 1*, 760 F.3d 708 (7th Cir. 2014) (discussing circumstances where nonpicketing conduct may constitute harassment or repeated trespass violative of 8(b)(4)(ii)(B)).[13]

As indicated above, the complaint alleges that Local 872's foregoing conduct also violated Section 8(b)(4)(i)(B) of the Act, which prohibits a union from inducing or encouraging a secondary/neutral employer's *employees* to stop working. However, as discussed above, both of the subject banners faced Paradise Road, the major public road running past the Westgate front entrance, and did not call for an employee strike or any other form of job action. Further, there is no evidence that any of the banner holders spoke to any Westgate employees or that any Westgate employees actually stopped work. As for the rat in the event center employee driveway, the gate inside the driveway was locked with a chain and padlock, and thus no employees used, or were expected to use, the driveway that day. See *SW Regional Council of Carpenters (New Star General Contractors, Inc.),* 356 NLRB 613 (2011) (rejecting a similar 8(b)(4)(i)(B) allegation involving stationary union banners for similar reasons). See also *Eliason*, 355 NLRB at 806, and *Brandon Regional Hospital*, 356 NLRB at 1294 (rejecting contention that the stationary union banners and inflatable rat at issue in those cases constituted unlawful "signal picketing").

Accordingly, for all the foregoing reasons, I find that the evidence fails to support the alleged violations.[14]

CONCLUSION OF LAW

Laborers Local 872 did not violate Section 8(b)(4)(i)(ii)(B) as alleged in the complaint.

ORDER

The complaint is dismissed.[15]

Dated, Washington, D.C., August 21, 2015

[12] Westgate's counsel sent a letter to the Union on March 10 notifying it that the inflatables were on private property (GC Exh. 4(a)). However, the record is unclear whether the Union had received the letter before putting the inflatables up on March 11. See Tr. 90.

[13] Westgate's post hearing brief (pp. 5–6, 16, 20, 30) makes much of Union Organizing Director DaSilva's admission at the hearing that the inflatables were intended to "piss off" Westgate (Tr. 296–297). However, it is the "characteristics of the conduct itself" that determines whether the conduct is coercive. *Carpenters Local 1827 (UPS, Inc.),* 357 NLRB 415, 417 (2011).

[14] In light of my findings that Local 872's conduct did not constitute picketing or disruptive or otherwise coercive nonpicketing conduct covered by Sec. 8(b)(4), it is irrelevant whether the conduct had a secondary object prohibited by that section. Thus, it is unnecessary to address the General Counsel's argument that the Union's continued placement of the banner on the traffic island after March 11, when Westgate set up a reserved gate for Nigro and its subcontractors (Tr. 93–94), was sufficient to establish a secondary object under the test set forth in *Sailors Union (Moore Dry Dock),* 92 NLRB 547, 549 (1950). See *UPS,* above at 420. For the same reason, it is likewise unnecessary to reach the Union's First Amendment and RFRA defenses to the alleged 8(b)(4)(ii)(B) allegations under the Supreme Court's recent decisions in *Reed v. Town of Gilbert*, *Arizona,* 135 S.Ct. 2218 (2015), and *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014). Finally, I also decline to reach the Union's requests for attorney's fees under 42 U.S.C. Sec. 1988(b) and for other affirmative relief, as the requests were made for the first time in the Union's posthearing brief and the General Counsel and Westgate have not had an opportunity to respond.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.